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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Julian Mendoza,)	
)	
Defendant/Movant,)	
)	CR 09-01406 PHX SRB
v.)	CIV 11-00513 PHX SRB(MEA)
)	
United States of America,)	REPORT AND RECOMMENDATION
)	
Plaintiff/Respondent.)	
)	
_____)	

TO THE HONORABLE SUSAN R. BOLTON:

On or about March 18, 2011, Mr. Julian Mendoza ("Movant") filed a pro se Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. § 2255. Respondent filed a response to Movant's motion to vacate or set aside his sentence on October 27, 2011. See Civil Doc. 15.

I Procedural History

Movant and five co-defendants were arrested on November 3, 2009. On November 4, 2009, a complaint was filed charging Movant and his co-defendants with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine. See Criminal Doc. 1. On November 10, 2009, a federal grand jury returned a three count indictment against Movant and his co-defendants, charging one count of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine (Count 1), and one count of attempted possession with intent to distribute

1 5 kilograms or more of cocaine (Count 2), and possession of a
2 firearm in furtherance of a drug trafficking crime (Count 3).
3 See Criminal Doc. 17.

4 On October 4, 2010, pursuant to a written plea
5 agreement lodged on October 4, 2010, see Criminal Doc. 163,
6 Movant entered a guilty plea on a lesser included offense of
7 Count 1 of the indictment. See Criminal Doc. 162 & Doc. 164.
8 The lesser offense was conspiracy to possess with intent to
9 distribute 500 grams or more of cocaine. See Criminal Doc. 163.

10 The plea agreement noted the maximum sentence possible
11 for this crime was forty years imprisonment and that the
12 statutory minimum sentence was five years imprisonment. See id.
13 The written plea agreement provided that Movant would be
14 sentenced to no more than the "high end" of the sentencing range
15 provided by the "final advisory guideline range" as determined
16 by the Court. Criminal Doc. 163 & Doc. 394. The plea agreement
17 stipulated the guideline range would reflect Movant's possession
18 of a weapon in furtherance of the count of conviction.
19 See Criminal Doc. 394. The plea agreement also stipulated that
20 Movant would be allowed to argue "sentence entrapment" at his
21 sentencing hearing and that imposition of a mandatory minimum
22 sentence was not appropriate. Id. The plea agreement provided
23 that, however, Movant would not be allowed to appeal an
24 unfavorable decision by the Court on the issue of imposition of
25 a mandatory minimum sentence. Id.

1 The plea agreement further states:

2 The defendant waives any and all motions,
3 defenses, probable cause determinations, and
4 objections which the defendant could assert
5 to the indictment or information or to the
6 Court's entry of judgment against the
7 defendant and imposition of sentence upon the
8 defendant, providing the sentence is
9 consistent with this agreement. The
10 defendant further waives (1) any right to
11 appeal the Court's entry of judgment against
12 defendant; (2) any right to appeal the
13 imposition of sentence upon defendant under
14 Title 18, United States Code, Section 3742
15 (sentence appeals); and (3) any right to
16 collaterally attack defendant's conviction
17 and sentence under Title 28, United States
18 Code, Section 2255, or any other collateral
19 attack. The defendant acknowledges that this
20 waiver shall result in the dismissal of any
21 appeal or collateral attack the defendant
22 might file challenging his conviction or
23 sentence in this case.

24 Id.

25 On January 3, 2011, before his sentencing and three
26 months after signing the plea agreement, Movant filed a pro se
27 motion seeking to change counsel and seeking to withdraw from
28 his plea agreement and asking the Court for a trial. See
Criminal Doc. 322. On January 21, 2011, Movant sent a letter to
the Court referencing his prior pro se motion and requesting a
change of counsel and again asking to withdraw from his plea
agreement. See Criminal Doc. 334.

On February 3, 2011, Movant filed another pro se motion
asking to withdraw from the plea agreement, citing his counsel's
ineffective representation. See Criminal Doc. 346. On February
8, 2011, Movant, through counsel, filed a motion seeking
resolution of the issue of Movant's counsel. See Criminal Doc.
351. On March 7, 2011, Movant, through counsel, filed a motion

1 seeking to withdraw from his guilty plea. See Criminal Doc.
2 366. On March 7, 2011, Movant, through counsel, also filed
3 objections to the presentence report and a motion seeking a
4 downward departure from the statutory sentence and applicable
5 sentencing guideline range. See Criminal Doc. 367 & Doc. 368.

6 At Movant's sentencing hearing on March 14, 2011, he
7 requested he be allowed to withdraw his motions seeking to
8 withdraw from the plea agreement and his motions to change
9 counsel, which request was granted by the Court. See Criminal
10 Doc. 386. At his sentencing Movant's final adjusted guideline
11 sentencing range was determined to be 188 to 235 months. See
12 Response (Civil Doc. 15), Exh. 2. At that time the Court
13 granted Movant's motion at Criminal Doc. 368, seeking a variance
14 from the statutory sentence. See id. Movant was sentenced to
15 a term of 78 months imprisonment, with credit for time served
16 prior to the date of sentencing. Id.

17 In his section 2255 motion Movant asserts his counsel
18 was ineffective because he allegedly misrepresented Movant's
19 potential sentence. Movant also contends that the government
20 improperly withheld information regarding a confidential
21 informant. Movant further argues he is entitled to relief
22 because his counsel was ineffective for failing to investigate
23 the issue of the confidential informant. Movant also contends
24 that he was entrapped into committing the crime of conviction.

25 In response, Respondent argues:

26 Defendant waived his right to assert a
27 Section 2255 motion in his plea agreement.
28 Further, at his sentencing, defendant moved
to withdraw his two pro se motions that, as
will be discussed shortly, contained the same

1 allegations that are found in his Section
2 2255 motion, thereby waiving these specific
3 issues from consideration. Lastly, there was
4 no discovery violation for his counsel to
 investigate. None of defendant's assertions
 have any merit, nor are they borne out by the
 record.

5 Civil Doc. 15 at 4.

6 **II Analysis**

7 **Waiver of the right to a collateral attack**

8 Respondent asserts that this section 225 action must be
9 dismissed because Movant waived his right to collaterally attack
10 his conviction and sentence in the written plea agreement. The
11 plea agreement signed by Movant expressly waived his right to
12 collaterally attack any matter pertaining to Movant's conviction
13 and sentence if the sentence imposed was consistent with the
14 written terms of the agreement. The sentence imposed on Movant
15 was consistent with the terms of the plea agreement. Because
16 the sentence imposed was in accordance with the plea agreement,
17 the plea agreement is valid. Therefore, Movant is bound by the
18 plea agreement's waiver of his right to collaterally attack his
19 conviction and sentence.

20 Because Movant legitimately waived his right to bring
21 this action, his section 2255 motion may be summarily denied.
22 See Mabry v. Johnson, 467 U.S. 504, 508-09, 104 S. Ct. 2543,
23 2546-47 (1984) ("It is well settled that a voluntary and
24 intelligent plea of guilty made by an accused person, who has
25 been advised by competent counsel, may not be collaterally
26 attacked."); United States v. Jeronimo, 398 F.3d 1149, 1157 (9th
27 Cir. 2005) (reaching this conclusion in the context of a direct
28 appeal wherein the Movant waived his right to directly appeal or

1 collaterally attack his conviction and sentence in a plea
2 agreement); United States v. Bolinger, 940 F.2d 478, 480-81 (9th
3 Cir. 1991).

4 A defendant's waiver of his right to a direct appeal
5 and a section 2255 action is enforceable if the language of the
6 waiver encompasses his right to appeal on the grounds raised,
7 and the waiver is knowingly and voluntarily made. See United
8 States v. Speelman, 431 F.3d 1226, 1229 (9th Cir. 2005).
9 However, a plea agreement which waives the Movant's right to
10 collaterally attack their sentence is not enforceable if the
11 waiver was involuntary. See, e.g., Washington v. Lampert, 422
12 F.3d 864, 870-71 (9th Cir. 2005). See also United States v.
13 White, 307 F.3d 336, 343 (5th Cir. 2002). A collateral attack
14 alleging ineffective assistance of counsel in negotiating a plea
15 agreement may be brought notwithstanding a waiver of this right
16 in a plea agreement if the agreement was involuntary or
17 unknowing or where the agreement was otherwise unlawful. See
18 United States v. Cockerham, 237 F.3d 1179, 1182 (10th Cir.
19 2001)("[A] waiver of appeal may not be enforced against a
20 section 2255 petitioner who claims that ineffective assistance
21 of counsel rendered that waiver unknowing or involuntary.");
22 Bridgeman v. United States, 229 F.3d 589, 591 (7th Cir. 2000).

23 At Movant's sentencing hearing, in direct response to
24 the Court's query regarding Movant's previous request to change
25 counsel, Movant informed the Court that he had read the plea
26 agreement and sentencing report and discussed them with his
27 counsel and that he was satisfied with his counsel's
28 representation. Civil Doc. 15, Exh. 5 at 6-7. Movant's

1 contemporaneous statements regarding his understanding of the
2 plea agreement carry substantial weight in determining if his
3 entry of a guilty plea was knowing and voluntary. See United
4 States v. Mims, 928 F.2d 310, 313 (9th Cir. 1991); United States
5 v. Walker, 160 F.3d 1078, 1096 (6th Cir. 1998) (holding that "a
6 straightforward and simple 'Yes, your Honor' is sufficient to
7 bind a Movant to [the] consequences [of a plea agreement].").
8 Additionally, because he was adequately informed of the
9 consequences of his plea, Movant's guilty plea can be considered
10 voluntary and knowing. See Boykin v. Alabama, 395 U.S. 238,
11 242-43, 89 S. Ct. 1709, 1712 (1969). The undersigned concludes
12 Movant's guilty plea was voluntary and made intelligently. See
13 Chizen v. Hunter, 809 F.2d 560, 562 (9th Cir. 1986); United
14 States v. Kamer, 781 F.2d 1380, 1383 (9th Cir. 1986).

15 Because Movant does not produce any evidence indicating
16 he did not knowingly and voluntarily enter into the agreement,
17 the undersigned concludes the plea agreement was valid, as was
18 Movant's voluntary waiver of his right to collaterally attack
19 his sentence. Accordingly, the section 2255 petition should be
20 denied and dismissed. Compare United States v. Pruitt, 32 F.3d
21 431, 433 (9th Cir. 1994).

22 **Movant's ineffective assistance of counsel claim**

23 The Sixth Amendment guarantees criminal
24 defendants the right to effective assistance
25 of counsel. Strickland v. Washington, 466
26 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674
27 (1984).... To prevail on a claim of
28 ineffective assistance of counsel, petitioner
must show 1) his attorney's performance was
unreasonable under prevailing professional
standards; and 2) there is a reasonable
probability that but for counsel's
unprofessional errors, the results would have

1 been different. United States v. Blaylock,
2 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting
3 Strickland, 466 U.S. at 687, 104 S. Ct. at
4 2064). "Strickland defines a reasonable
 probability as 'a probability sufficient to
 undermine confidence in the outcome.'" Id.

5 United States v. Span, 75 F.3d 1383, 1386-87 (9th Cir. 1996).
6 See also United States v. Thomas, 417 F. 3d 1053, 1056 (9th Cir.
7 2005).

8 The Sixth Amendment entitles a criminal defendant to "a
9 reasonably competent attorney, whose advice is within the range
10 of competence demanded of attorneys in criminal cases." United
11 States v. Cronic, 466 U.S. 648, 655, 104 S. Ct. 2039, 2044-45
12 (1984) (internal quotations omitted). In order to find that
13 Movant was deprived of the effective assistance of counsel and
14 grant him relief on this claim pursuant to section 2255 the
15 Court must conclude counsel's performance was deficient and that
16 the deficient performance prejudiced Movant. See United States
17 v. Withers, 638 F.3d 1055, 1066-67 (9th Cir. 2011). Movant
18 bears the burden of providing sufficient evidence from which the
19 Court can conclude his counsel's representation was
20 unconstitutionally ineffective. Id. In the context of a
21 defendant who pleads guilty, to be entitled to relief, the
22 movant must establish that, but for his counsel's allegedly
23 deficient performance, the movant would have chosen not to plead
24 guilty but to proceed to trial. See, e.g., Bethel v. United
25 States, 458 F.3d 711, 718 (9th Cir. 2006).

26 Counsel's performance is deficient when it is
27 unreasonable, or not "within the range of competence demanded of
28 attorneys in criminal cases." Strickland, 466 U.S. at 687, 104

1 S. Ct. at 2054. Judicial scrutiny of counsel's performance must
2 be "highly deferential." Id., 466 U.S. at 689, 104 S. Ct. at
3 2065. See also Carter v. Lee, 283 F.3d 240, 248-49 (4th Cir.
4 2002). Movant must overcome a strong presumption that his
5 counsel's representation was within a wide range of reasonable
6 professional assistance. See United States v. Ferreira-Alameda,
7 815 F.2d 1251, 1253 (9th Cir. 1996); United States v. Molina,
8 934 F.2d 1440, 1447 (9th Cir. 1991).

9 Movant asserts his plea was "unlawfully induced"
10 because his defense counsel told him he would receive a sentence
11 of "0-5 years" and that his sentence would be based upon
12 "Sentencing Entrapment and Robbery guidelines." Movant contends
13 his counsel encouraged him to take the plea because a jury would
14 not believe that Movant had been entrapped into committing the
15 crime. See Civil Doc. 1 at 5.

16 Movant's counsel was not unconstitutionally ineffective
17 because he allegedly advised Movant that a jury would probably
18 find him guilty notwithstanding an entrapment defense. As noted
19 by Respondent, the Court had occasion to evaluate the argument
20 that Movant was entrapped in the context of another co-
21 defendant's trial, other co-defendants' pleadings, and Movant's
22 counsel's statements prior to and at the sentencing hearing.

23 Additionally, had he not accepted the plea agreement
24 and proceeded to trial, Movant faced a sentence substantially in
25 excess of the 78 month sentence imposed. Respondent notes:

26 Based upon the drug quantity, had defendant
27 been convicted at trial of Count 3 and either
28 Count 1 or Count 2, the district court would
have been required by statute to sentence
defendant to no less than 15 years (180

1 months). In fact, as detailed in defendant's
2 Presentence report, based upon drug quantity
3 and upward adjustments for body armor and
4 firearms, his post-trial advisory guideline
5 sentencing range would have been 322 to 387
6 months, reflecting of a guideline range of
7 262 to 327 months prison for Counts 1 and 2,
8 coupled with an mandatory minimum additional
9 60 consecutive months for Count 3.

10 Civil Doc. 15 at 11.

11 The plea agreement specified that Movant would be
12 sentenced at the "high end" of the applicable sentencing
13 guideline range, which was determined to be 188 to 235 months.
14 Movant's counsel's efforts resulted in the Court agreeing to
15 depart downward from the statutory and sentencing guideline
16 sentence and Movant was sentenced to a term of 78 months
17 imprisonment, a vastly shorter time than the 235 months that
18 would be allowed by the guideline range and plea agreement and
19 a vastly shorter term of incarceration than the 40 years
20 possible if Movant had gone to trial on this charge alone.
21 Additionally, the plea agreement allowed Movant to challenge his
22 conviction based on the theory that Movant was entrapped.

23 Movant has not established that his counsel's advice
24 with regard to the potential sentence he faced if he accepted
25 the plea was unconstitutionally deficient or prejudicial. "To
26 establish a claim of ineffective assistance of counsel based on
27 alleged erroneous advice regarding a guilty plea, a petitioner
28 must demonstrate more than a 'mere inaccurate prediction.'" Sophanthavong v. Palmateer, 378 F.3d 859, 868 (9th Cir. 2004),
quoting Iaea v. Sunn, 800 F.2d 861, 864-65 (9th Cir. 1986).
Defense counsel's alleged erroneous predictions as to the likely

1 sentence following a guilty plea, "are deficient only if they
2 constitute 'gross mischaracterization of the likely outcome' of
3 a plea bargain 'combined with ... erroneous advice on the
4 probable effects of going to trial.'" Id., quoting United
5 States v. Keller, 902 F.2d 1391, 1394 (9th Cir. 1990).
6 Furthermore, if the defendant was informed prior to entering his
7 guilty plea of the potential sentence he could receive, he
8 cannot establish prejudice from counsel's incorrect prediction
9 as to his sentence. See Womack v. Del Papa, 497 F.3d 998,
10 1003-4 (9th Cir. 2007). See also United States v. Garcia, 909
11 F.2d 1346, 1348 (9th Cir. 1990) (explaining that an erroneous
12 sentence prediction "does not entitle a defendant to challenge
13 his guilty plea"); Shah v. United States, 878 F.2d 1156, 1162
14 (9th Cir. 1989) (finding that an inaccurate sentence prediction
15 was not prejudicial).

16 The Ninth Circuit Court of Appeals has held that, in
17 the context of a defendant who pleads guilty, an attorney's
18 performance may only be deemed unconstitutionally deficient when
19 counsel "grossly" mischaracterizes the likely sentence to be
20 received when counseling the defendant to plead guilty. See
21 Doganieri v. United States, 914 F.2d 165, 168 (9th Cir. 1990).
22 In cases where the Ninth Circuit has found gross
23 mischaracterization the sentence received by the defendant was
24 of a different order of magnitude than what Movant asserts in
25 this matter as constituting counsel's deficient performance.
26 Compare Chacon v. Wood, 36 F.3d 1459, 1464 (9th Cir. 1994),
27 superseded by statute on other grounds as stated in Morris v.
28

1 Woodford, 229 F.3d 775, 779 (9th Cir. 2000) (three months
2 predicted; ten years imposed); Iaea, 800 F.2d at 865.

3 **III Conclusion**

4 Movant waived his right to collaterally attack his
5 convictions and sentences in his plea agreement. Movant has not
6 established that his waiver of these rights was not knowing and
7 voluntary. Additionally, Movant has not established that he was
8 denied his right to the effective assistance of counsel because
9 his counsel allegedly misrepresented the length of the sentence
10 which was imposed.

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12 **IT IS THEREFORE RECOMMENDED** that Mr. Mendoza's motion
13 for relief from his convictions and sentences pursuant to
14 section 2255 be **denied and dismissed with prejudice**.

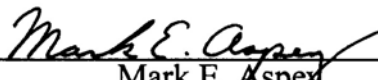
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16 This recommendation is not an order that is immediately
17 appealable to the Ninth Circuit Court of Appeals. Any notice of
18 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
19 Procedure, should not be filed until entry of the district
20 court's judgment.

21 Pursuant to Rule 72(b), Federal Rules of Civil
22 Procedure, the parties shall have fourteen (14) days from the
23 date of service of a copy of this recommendation within which to
24 file specific written objections with the Court. Thereafter,
25 the parties have fourteen (14) days within which to file a
26 response to the objections.

27 Pursuant to Rule 7.2, Local Rules of Civil Procedure
28 for the United States District Court for the District of

1 Arizona, objections to the Report and Recommendation may not
2 exceed seventeen (17) pages in length. Failure to timely file
3 objections to any factual or legal determinations of the
4 Magistrate Judge will be considered a waiver of a party's right
5 to de novo appellate consideration of the issues. See United
6 States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en
7 banc). Failure to timely file objections to any factual or
8 legal determinations of the Magistrate Judge will constitute a
9 waiver of a party's right to appellate review of the findings of
10 fact and conclusions of law in an order or judgment entered
11 pursuant to the recommendation of the Magistrate Judge.

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13 DATED this 7th day of December, 2011.

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16 Mark E. Asper
United States Magistrate Judge
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